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In the
Supreme Court of the United States

OCTOBER TERM, 1985

NO. _____

JOEL A. VERNON, SR., *Petitioner*

- Versus -

STATE OF LOUISIANA, *Respondent*

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not Petitioner, who was convicted of second degree "felony-murder" was given adequate notice of the crime for which he was convicted by an indictment which charged first degree "specific intent" murder?

II. Whether or not the jury, when considering the evidence in the light most favorable to the prosecution, could have found the essential elements of aggravated kidnapping beyond a reasonable doubt?

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OPINIONS BELOW

1. *Vernon v. Maggio, No. 84-4407* (5th Cir. December 5, 1984) *per curiam, appeal denied,* (February 20, 1984) *suggestion for rehearing en banc denied.*

2. *Vernon v. Maggio, No. 83-2221* (W.D.La. May 23, 1984) *modified* June 5, 1984.

JURISDICTION

Jurisdiction to review the judgment of the United States Fifth Circuit Court of Appeals in this case, dated December 5, 1984, rehearing denied February 20, 1985 and entered that same date is conferred upon this Honorable Court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions which the case involves are set forth, verbatim, in the Appendix, p. A/46-A/47:

United States Constitution, Amendment VI.
United States Constitution, Amendment XIV, Section 1.
Louisiana Code of Criminal Procedure Annotated, article 814.
Louisiana Revised Statutes Annotated, Section 14:30, amended by Acts 1976, No. 657.
Louisiana Revised Statutes Annotated, Section 14:30.1, amended by Acts 1978, No. 769.
Louisiana Revised Statutes Annotated, Section 14:44.

STATEMENT OF THE CASE

The following facts are distilled from the opinion of the Louisiana Supreme Court on direct review in *State v. Vernon, 385 So.2d 200, 203 (La. 1980)*.

On October 31, 1978, the victim, Michael E. Melcher was present in the back room of the Cave Bar in Leesville, Louisiana. Also present were the petitioner (Vernon), James Regallis and Timothy Bray. Melcher was pressed to repay a debt at which time a small fracas ensued.

According to Bray, the State's only direct witness, the three then ordered Melcher into Vernon's stationwagon and took him to the Vernon Parish sanitary landfill. Once there, they subjected Melcher to a severe beating and left him lying there, apparently still alive.

A short time later, Bray, Regallis and a fourth subject, Dale Slama, returned to the site of the beating. According to Bray, the victim felt cold and didn't appear to be breathing. Slama removed Melcher's wallet, and with Bray's help, moved the victim deeper into

the woods. Regallis set fire to the body.

Petitioner was found guilty of second degree murder after trial by jury in response to an indictment charging him with first degree murder. The conviction was affirmed by the Louisiana Supreme Court on May 19, 1980.

The issues before this Honorable Court were first raised in the state district court in an application for post conviction relief which was denied on November 17, 1982. Supervisory writs were taken to and denied by the state supreme court on March 4, 1983.

Having exhausted all state remedies with respect to the issues raised herein, Petitioner applied to the United States District Court for the Western District of Louisiana, Lake Charles Division, for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254.

The writ was initially *granted* by the trial court. The very next day, however, the district court issued a minute entry which, in effect, invited the State to apply for a rehearing. The motion was granted over Petitioner's objection.

On May 23, 1984, after oral argument, the trial court recalled the writ, reversed itself, and dismissed the case.

Appeal was taken to the Court of Appeals. The case was placed on the summary docket and on December 5, 1984 the Court, in a per curiam, affirmed, adopting the reasons of the trial court set forth in its memorandum filed May 23, and June 5, 1984. (Appendix, pp. A/6-A/25). A suggestion for rehearing en banc was timely filed and denied on February 20, 1985.

ARGUMENT

The federal district court has already *granted* the relief sought in this petition. In a well-reasoned opinion dated March 20, 1984 (Appendix, pp. A/31 - A/44) the trial court granted a writ of habeas corpus, reversed Petitioner's conviction, and ordered a retrial. After signing and issuing the writ, however, the trial court reversed itself on May 23, 1984. The later ruling was adopted by the Court of Appeals in a per curiam.

By adopting the ruling of the trial court

the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decision of the Sixth Circuit in *Watson v. Jago, 558 F.2d 330 (6th Cir. 1977)*, the Ninth Circuit in *Gray v. Raines, 662 F.2d 569 (9th Cir. 1982)* and indeed, its own prior decision in *Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983)*. Each of these cases has been relied upon extensively by the lower courts. The questions presented have not been settled by this Court and are, therefore, proper subjects for review.

The two questions presented for review, although conceptually distinct, are very closely related. Both deal with the constitutionality of the "responsive" or "compromise" verdict returned by Petitioner's jury.

I.

Petitioner's conviction of second degree "felony-murder" violated the Sixth and Fourteenth Amendments since the indictment, which charged Petitioner with first degree "specific intent" murder, failed to give adequate notice of the crime for

which he was convicted.

A.

Petitioner was charged by indictment in the October 31, 1978 slaying of Michael Melcher. The bill of indictment alleged that Petitioner "committed first degree murder of Michael Melcher, in violation of La. Rev. Stat. Ann. Section 14:30 (a felony)." First degree murder, on the date of the offense, was defined as:

> "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm . . ." La. Rev. Stat. Ann. Section 14:30, as amended by Acts 1976, No. 657, effective October 1, 1976.

After trial by jury, Petitioner was convicted of second degree murder, a "responsive verdict" which, at the time of the offense, was defined as:

> "Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, and armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm..." La. Rev. Stat. Ann. Section 14:30.1 as amended by Acts 1978, No. 769, Section 1, effective September 8, 1978.

First degree murder on the date of the crime,

therefore, was defined simply as a specific intent killing. The definition of second degree murder, on the other hand, was limited to the crime of statutory felony-murder. In *State v. Booker, 385 So.2d 1186 (La. 1980)*, a decision squarely on point with the case at bar, the Louisiana Supreme Court reversed a conviction for attempted second degree murder where the indictment charged attempted first degree murder and held that despite the inclusion of attempted second degree murder in the responsive verdict statute *(Louisiana Code of Criminal Procedure Annotated, Article 814)*, attempted second degree murder, as defined in 1978, was not a lesser included offense of attempted first degree murder since conviction of the former offense required proof of an element, i.e. the commission of an underlying felony, which conviction of the latter did not. The holding was founded upon principles of constitutional due process. In reversing the conviction, the court said that:

> "...it was a violation of due process to convict the defendant upon a charge of attempted second

degree murder, a charge of which he was not given adequate notice and against which he had no chance to defend."

The constitutional rationale expressed by the Louisiana Supreme Court in *State v. Booker, 385 So. 2d 1186 (La. 1980)* and the result obtained in that case were well supported by federal law.[1] The *Booker* decision has never been reversed and its limited holding, that the 1978 second degree murder statute was not a lesser included offense of first degree murder, is still good law. In the cases which have followed *Booker*, however, the state supreme court has rejected the underlying rationale behind its reversal of *Booker's* conviction -- lack of constitutional notice. A majority of the Louisiana Supreme Court is

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1. Mildwoff v. Cunningham, 432 F.Supp. 814 (D. C.N.Y. 1977); Vasques v. Vaughn, 454 F.Supp. 194 (D.C. Del. 1978); Boothe v. Wyrick, 452 F. Supp. 1304 (W.D. Mo. 1978); Williams v. Nix, 528 F.Supp. 664 (S.D.Iw.1981); Watson v. Jago, 558 F.2d 330 (6th Cir. 1977); Gray v. Raines, 662 F.2d 569 (9th Cir. 1982); Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983). It is interesting to note that the Ninth Circuit in *Gray v. Raines, supra,* cited *State v. Booker,* with approval, *662 F.2d at 576, footnote 1).*

now of the opinion that notice was given to defendants charged under the 1978 first degree murder statute and due process was thereby satisfied, by the fact that second degree murder was listed as a "responsive verdict," in *Article 814* of the Louisiana Code of Criminal Procedure. *State ex rel Elaire v. Blackburn, 424 So.2d 246 (La. 1982), footnote 10.*

In its original ruling issued March 20, 1984, the United States District Court for the Western District of Louisiana, Lake Charles Division, agreed with petitioner's contention on this claim and granted the application for writ of habeas corpus. The court in its memorandum, came to the identical conclusion that the *Booker* court had -- that Petitioner had been deprived of notice and due process of law.

The courts below now endorse the Louisiana Supreme Court's opinion in *Elaire* that the inclusion of second degree murder as a responsive verdict in *Article 814* Louisiana Code of Criminal Procedure was sufficient to notify Petitioner, in a constitutional sense, of the

charges against which he was expected to defend. This holding by the Louisiana Supreme Court, adopted by the courts below, is unsupported by federal case law and is constitutionally erroneous.

In the first place, the opinion assumes that notice can constitutionally be given outside the four corners of the indictment itself. Moreover, the courts below have overlooked the legislative purpose and judically recognized function of *Article 814*. Before addressing these shortcomings, however, a review of the applicable federal constitutional principles is in order.

B.

The right of the accused to reasonable notice of the charge against him is the most basic ingredient of due process, guaranteed by the Sixth Amendment and applicable to state proceedings by virtue of its incorporation into the Fourteenth Amendment. *In Re Oliver, 333 U.S. 257 (1948); Cole v. Arkansas, 333 U.S. 196 (1948); DeJonge v. Oregon, 299 U.S. 353 (1937);*

Faretta v. California, 422 U.S. 806 (1975). It is axiomatic that a person be tried and convicted only for the specific offense with which he is charged. *Cole v. Arkansas, supra; Jackson v. Virginia, 99 S.Ct. 2781 (1979).* Any variance between indictment and proof which "destroys the defendant's substantial right to be tried only on charges presented in an indictment" is not harmless error. *Stirone v. United States, 316 U.S. 212, 217 (1940).*

The notice requirement is facilitated by the use of an indictment. *Russell v. United States, 369 U.S. 749 (1962).* While sufficiency of an indictment or information is primarily a question of state law, a violation of due process arising from lack of fair and reasonable notice constitutes a claim that is cognizable in federal habeas corpus. *Goodloe v. Parrat, 605 F.2d 1041 (8th Cir. 1979); Blake v. Morford, 563 F.2d 248 (6th Cir. 1977); see Tarpley v. Estelle, supra; Gray v. Raines, supra; Watson v. Jago, supra.*

The requirement of fair notice is only met

if the words used in the indictment "fully, directly and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Carll, 105 U.S. 611 (1942).* Once notice is given, however, it is not limited to the crime actually specified in the indictment. Notice is deemed to include all lesser included offenses of the crime charged, and it has been held that a conviction of the lesser included offense under these circumstances is constitutional. *United States v. Marin, 513 F.2d 974 (2nd Cir. 1975); Kelly v. United States, 370 F.2d 227 (U.S.App.D.C. 1966).*

Whether or not a specific offense is a "lesser included offense" of the crime charged is a question of state law. *Mildwoff v. Cunningham, supra; Vasquez v. Vaughn, supra; Boothe v. Wyrick, supra; Williams v. Nix, supra; Watson v. Jago, supra; Gray v. Raines, supra; Tarpley v. Estelle, supra.*

According to the foregoing authorities,

where a responsive verdict is not a lesser included offense of the crime charged in the indictment, a conviction of that responsive verdict is unconstitutional and constitutes reversible error.

In *Watson v. Jago, supra,* the Sixth Circuit Court of Appeals reversed the defendant's conviction of second degree "felony murder" in keeping with the foregoing principles. The indictment had charged Watson with premeditated murder in the first degree. The court held that he was deprived of due process of law when he was forced, during the state court trial, to defend against a charge of felony-murder, (a separate and distinct crime under Ohio law requiring a different formal charge) not contained in the indictment.

The express holding of the Louisiana Supreme Court in *State v. Booker, supra,* was that second degree murder was not a lesser included offense of first degree murder in 1978. While the underlying rationale of *Booker* has been called into question by subsequent decisions,

this limited holding has never been modified and is still the settled law of the State of Louisiana today.

The courts below, however, distinguished the instant case from *Watson* on the basis of Louisiana's "responsive verdict" statute, *Article 814* of the Louisiana Code of Criminal Procedure. They have interpretated the United States Constitution in a manner which would allow a state legislature to furnish notice to defendants to the charges against which they must defend by means of a statute which lists the various verdicts which a jury is permitted to return in response to a given indictment, *whether or not said verdicts are lesser included offenses of the offense charged.*

In so ruling, the courts have, in effect, created out of whole cloth, a new exception to the constitutional rule established in the foregoing federal cases. A conviction that is clearly unconstitutional under *Watson* can be saved by a procedural statute which "calls a spade a heart") or, in other words, calls a

non-responsive verdict, "responsive"). Such an exception is clearly unconstitutional when viewed in the light of the purposes which the indictment and the statute in question were originally intended to serve.

C.

1. Can a defendant be given notice of the charges against him by a statute which lists the various responsive verdicts, or must that purpose be served by the indictment itself?

The overwhelming federal authority supports the view that the indictment or information is the only vehicle through which a defendant can be notified, in a constitutional sense, of the charges against him. Courts have routinely rejected the notion that actual notice supplied outside of the indictment satisfies the due process clause.

In *Russell v. United States, 369 U.S. 749 (1962)*, this honorable Court rejected the government's contention that a defective indictment (one which omitted essential averments

relative to the elements of the offense charged) could be cured by a bill of particulars. To countenance such a procedure, the Court reasoned, would allow the government to usurp the function of the grand jury.

In *Gray v. Raines, supra,* the defendant was charged with first degree rape but convicted of second degree statutory rape. The state argued that notice was proper since both first and second degree rape were contained in the same substantive criminal statute. *Arizona Revised Statute Section 13:611.* Besides this, the defendant also had actual knowledge of the victim's age by virtue of his presence at a preliminary hearing. The Ninth Circuit, citing with approval the Louisiana Supreme Court's decision in *Booker,* reversed the defendant's conviction. The prosecution's failure to give the defendant notice of the statutory rape charge in the information constituted per se reversible error, notwithstanding inclusion of the charge in the same substantive criminal statute charged in the information. The *Gray*

court explained, citing *In Re Hess, 288 P.2d 5 (1955):*

> "Obviously the State of Arizona may organize its criminal laws in whatever manner it chooses. The state cannot, however, use a classification scheme to circumvent the constitutional notice requirement imposed on the state when charging a defendant with an offense."

If adequate notice is not given by a substantive criminal statute which defines the elements of both the greater offense charged in the indictment and the lesser offense, how, it must be asked, can adequate notice be furnished by a separate procedural statute such as *Article 814, Louisiana Code of Criminal Procedure Annotated,* which was never intended to serve such a function?

2. Assuming that notice can be given by statute, can a court interpret and apply an existing statute in this way, and give it retroactive application, when it was never intended by the legislature which enacted it to serve such a purpose?

What is more disturbing about the district court's decision and the state supreme court's

decision in the post-*Booker* cases is their refusal to recognize that *Article 814* was never intended by the legislature to serve the function of an indictment.

The state legislature, in its original revision comments to *Article 814*, has made it clear that a particular verdict should not be deemed responsive unless all of the essential elements of the lesser crime "(are) included in the indictment for the offense charged" *(Article 814, Louisiana Code of Criminal Procedure Annotated, comment (c))*.

The state supreme court has recognized and strengthened the principle expressed in the comment. In *State v. Peterson, 290 So.2d 307 (La. 1974)*, a case decided before *Booker*, the court held that *Article 814* is unconstitutional, as applied, where a crime listed as "responsive" is not a lesser included offense of the crime charged. This was the law at the time Vernon was charged and at the time he was tried. This interpretation of *Article 814* was re-affirmed in *State v. Booker*, decided two

years after Petitioner was indicted. The Louisiana Supreme Court has never, even in the cases following *Booker*, questioned the legislative intent behind *Article 814*. Indeed, it has completely ignored its prior decisions in reaching the unsupported conclusion that a defendant is notified by *Article 814*, in a constitutional sense, of the charges against which he must defend. *Elaire, supra.*

A defendant charged with any crime in 1978 could hardly be said to have been notified by *Article 814* when the legislative history and prior cases had consistently interpretated the article as a non-substantive, non-comprehensive listing of responsive verdicts compiled for the administrative convenience of trial courts.

Whether or not a state may furnish notice outside the four corners of an indictment by the use of a procedural statute is a question that has never been addressed by a federal court. Even assuming that it *is* constitutional to afford notice in this manner, it is fundamentally unfair to fail to provide notice that

the statute will be so used. To allow a state, in an *ex post facto* fashion to assert that notice has been provided by a statute whose judicially acknowledged purpose has been one of administrative convenience offends all traditional notions of fair play and substantial justice.

II.

Petitioner's conviction of second degree "felony-murder", violates the rule of *Jackson v. Virginia* since no rational trier of fact, when considering the evidence in the light most favorable to the prosecution, could have found the essential elements of any one of the felonies enumerated in Louisiana's second degree murder statute beyond a reasonable doubt.

In Claim II, Petitioner mounts an additional attack against the jury verdict in this case -- an attack which, although conceived out of the same factual context as Claim I, is founded upon seperate and distinct constitutional principles. The argument in Claim I focused on the

verdict as it related to the indictment. Claim II focuses upon the verdict *as a product of the evidence.*

Petitioner was convicted of second degree felony-murder, a crime which, at the time of its alleged commission, required proof of at least one of the seven felonies enumerated in *Louisiana Revised Statutes Annotated Section 14:30.1 (Acts 1978, No. 796, Section 1).* Petitioner's contention in Claim II is quite simple. A detailed review of the trial transcript will undoubtedly lead this Court to the conclusion that there is no evidence that Petitioner engaged in the perpetration of any one of the felonies in question. As such, Petitioner's conviction for second degree murder is violative of due process and is, therefore, unconstitutional.

The district court agreed with Petitioner's contention that the Constitution prohibits responsive verdicts or "compromise verdicts" which are not supported by the evidence. The trial court, however, after reviewing the

entire record in the light most favorable to the prosecution, concluded that a trier of fact could have found the essential elements of the crime of aggravated kidnapping beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 309 (1979).* Petitioner respectfully submits that this conclusion is unsupported by the evidence at trial, and is the product of the court's misinterpretation of the common law of crimes lative to aggravated kidnapping.

Michael Melcher was most certainly the victim of a simple kidnapping which occured *prior to* the events leading to his death. Petitioner concedes that Melcher was the victim an assault and battery, possibly an aggrated battery. None of the aforementioned crimes, however, were enumerated in the felony-murder statute in question.

In 1978, aggravated kidnapping was defined as follows:

> "Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person to give up anything of apparent present or prospective value,

> or to grant any advantage or immunity, *in order to secure a release of the person* under the offender's actual or apparent control:
> (1) The forcible seizing and carrying of any person from one place to another; or
> (2) The enticing or persuading of any person to go from one place to another; or
> (3) The imprisoning or forcible secreting of any person." *Louisiana Revised Statute Annotated Section 14:44* (Emphasis supplied).

In the recent case of *State v. Rodrigue, 441 So.2d 1274 (La. App. 1st Cir. 1983)*, the Louisiana First Circuit Court of Appeal had the occasion to distinguish the crime of simple kidnapping. The distinguishing element was identified as the *intent to deprive in order to secure a release*. The Court held that there was insufficient evidence to support a conviction for aggravated kidnapping. In explaining its ruling, the Court relied upon *State v. Moore, 432 So.2d 209 (La. 1983)*, wherein the Louisiana Supreme Court delivered its most recent interpretation of the statute:

> "Although the evidence established that the victim was forcibly seized and deprived of his valuables, the essential element of the crime, intent to deprive *in order to secure a release*, is missing. There is no evidence in the record

> from which any rational trier of fact could have concluded the victim was deprived of his valuables in exchange for his release or promise of release. The crime of aggravated kidnapping is limited to cases of kidnapping for ransom (i.e., kidnapping with intent to extort). La. Rev. Stat. Ann. Section 14:44, comment; State v. English, 367 So.2d 815, appendix at 823 (La. 1979)." 432 So.2d at 225 (emphasis in original).

A fuller understanding of the element of ransom is obtained by reference to the decisions of other states with statutes prohibiting similar conduct.

The taking or enticing of a person with the purpose of effecting a robbery or a beating is outside the purview of a statute which denounces a taking with the intention of securing a reward or ransom. *51 Corpus Juris Secundum idnapping, Section 1.* A clear distinction between kidnapping for ransom and kidnapping for robbery is presented by the facts of *State v. Leuth, 103 N.W. 345 (Iowa, 1905).* The victims, a husband and wife, were enticed into accompanying the defendant in his carriage. Soon after leaving their home, the defendant drew a gun on the victims and demanded money. The victims had no money. Upon learning of this,

the defendant told the husband that unless the latter paid him fifty thousand dollars by the following evening, he would kill the victim's wife; whereupon, he ordered the husband out of his carriage and drove off.

Fortunately, the wife, a Mrs. Telsrow, age 60, was able to escape. The Iowa Supreme Court's treatment of the case is illuminating:

> "It may well be doubted whether in procuring Telsrow and his wife to go with him, the stranger entertained any purpose other than that of robbery and therefore the taking or enticing by means of false report of a son's sickness was not with the unlawful purpose denounced by the statute. But the fair inference from what was then said and done is that upon discovering that they had no money, he immediately conceived the design of detaining her in order to extort money from him as the price of her subsequent return, surrender, or liberation; and if he so did, and actually detained her for any length of time with that intent, he was guilty of the offense charged." *103 N.W. at 346.*

The seizing or carrying away of a victim with the intent to commit robbery, mayhem, or other specific felonies is not within the scope of a crime which proscribes a ransoming. In such a case, the perpetrator must have the specific intent to hold the abducted person in unlawful captivity until a sum of money or

other thing of value is paid either by himself or by someone else in his behalf to secure his release. *Keith v. State, 163 So. 136 (Fl.1935).*

The comments to *Louisiana Revised Statutes Annotated Section 14:44* indicate that our aggravated kidnapping law, like Florida's and Iowa's, was intended to punish kidnapping for ransom -- a forcible abduction with the intent to hold the victim *until* a ransom is paid. The abduction paves the way for an illegal transaction to take place. In contract law terms, the transaction can be called a cash sale -- money or cash given in exchange for the release of the abducted person.

The issue for decision, therefore, can be stated as follows: whether, after viewing the evidence as a whole in the light most favorable to the prosecution, any rational juror could have found the intent to ransom beyond a reasonable doubt. *Jackson v. Virginia, 99 S.Ct. 2781.*

During oral argument, in the trial court below, the State made reference to several pages of the transcript which supposedly con-

tain evidence of an aggravated kidnapping. A review of the cited portions of the transcript suggests that a greater part of this testimony was intended to establish the abduction or forcible taking of Melcher from one place to another - one element of aggravated kidnapping which Petitioner concedes, is established by the evidence. The only testimony which would arguably support a finding of the remaining elements, however, came when Timothy Bray was asked what his intentions were in accompanying the victim to the landfill. He answered, "My intention was to beat Michael Melcher in the hope that he might pay me my money."

The State's case for aggravated kidnapping is little served by this testimony. No one, including Petitioner, denies that the overall objective in abducting and beating Melcher was to get him to repay a debt. The crucial issue, however, is *how* the perpetrators intended this to be accomplished.

It is the method used to obtain the money that constitutes the gravamen of the offense.

Neither the testimony quoted above, nor the remaining transcript suggests that the debt was to be recovered by ransom or extortion. Indeed, if we look to the transcript as a whole, it is abundantly clear from the words and actions of those involved that no such purpose was intended or attempted, much less accomplished.

The fact that Melcher was abondoned after the first beating, and that no outside party from whom a ransom could be demanded was contacted concerning his release, is, Petitioner submits, dispositive of this issue. Since ransom is a cash transaction, the offender's consideration or leverage is lost once the body of the person is released. For the crime to be successful, the victim must be held until the ransom is paid.

While it is not necessary that the words "ransom" or "reward" be expressly stated to the victim, it *is* necessary that the victim reasonably understand the offender's demands for money as a condition for his release. *Knuston v. Brewer, 619 F. 2d 747 (8th Cir. 1980).* The

evidence provides no basis for such a belief on Melcher's part. In fact, the words spoken *by* Melcher and *to* Melcher evince a contrary intent on the part of his assailants.

Question by Mr. Tilley:

Q. "What did they tell Michael Melcher in your presence?

Answer by Timothy Bray"

A. "They told Michael Melcher that they were taking him to a loan shark, at a designated meeting place and the loan shark would pay them off and in turn would take care of Michael Melcher which ever way he seen fit. (Transcript, page 479, lines 4-19).

If we are to believe the State's witness, then, the victim would have had no reason to suspect that he was being kidnapped for ransom since he was told by his captors that the debt which he owed was to be extinguished by a third party who would then handle him as the third party pleased. That Melcher understood this, and the futility of his situation, is evidenced by the transcript, page 886, lines 16-25.

The State correctly identified the intent of the perpetrators of this crime from the outset.

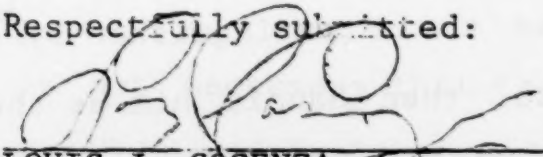
As the prosecutor stated for the jury in his opening statement, the perpetrators of this crime meant to teach Melcher a lesson he would never forget. A simple kidnapping for this purpose, however, does not, as a matter of state law, constitute an aggravated kidnapping.

Since there is no evidence of an underlying felony, Petitioner's conviction for felony-murder must be reversed for insufficiency of evidence under the rule of *Jackson v. Virginia, supra.*

CONCLUSION

For the reasons mentioned above, the judgement of the Court of Appeals for the Fifth Circuit should be reversed, and the petition granted.

Respectfully submitted:



LOUIS J. COSENZA
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Post Office Box 1147
Leesville, Louisiana 71496-1147
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A-P-P-E-N-D-I-X

APPENDIX INDEX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4407

JOEL A. VERNON, SR.,

Petitioner-Appellant,

VS

FRANK BLACKBURN, WARDEN,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 12/5/84, 5 Cir., 198_, ___F.2d___)

(FEBRUARY 20, 1985)

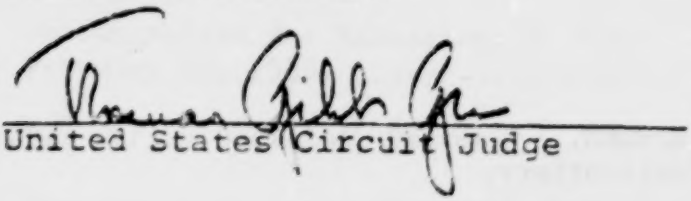
Before GEE, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court have been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge

REHG-8

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4407
SUMMARY CALANDER

JOEL A. VERNON, SR.,

Petitioner-Appellant,

VS.

FRANK BLACKBURN, WARDEN,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

(December 5, 1984)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM: */

The order of the trial court denying relief is AFFIRMED for the reasons stated in its memorandum filed May 23 and June 5, 1984. See also *Stewart v. Blackburn, No. 83-3641, slp op. at 723* (5th Cir. Nov. 12, 1984).

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*/ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

JOEL A. VERNON, SR.,

VS. CIVIL ACTION NO. 83-2221

ROSS MAGGIO, WARDEN
LOUISIANA STATE PENITENTIARY

MAY 23, 1984[1]

Petitioner was charged by grand jury indictment with the first degree murder of Michael Melcher in violation of LSA-R.S.14:30. He was convicted of second degree murder. The conviction was affirmed by the Louisiana Supreme Court on May 19, 1980.[2]

A motion for a new trial on grounds of newly discovered evidence was denied by the trial court. Writs of certiorari were taken to the Louisiana Supreme Court

---

1. On March 20, 1984, we filed a memorandum granting the writ, noting on March 21st that if the State disagreed with our conclusions, then and in that case a motion for re-hearing should be filed. The motion was made. The re-hearing was granted, and oral arguments were heard on April 23, 1984. We recall our opinion and order of March 20, 1984, and substitute this ruling in lieu thereof.

2. *385 So.2d 200.*

requesting a review of the denial. Writs were denied on May 27, 1981.

The issues now before this court were first raised in the state district court in an application for post conviction relief filed on August 17, 1982. Therein, petitioner contended that he was denied effective assistance of counsel; and (2) that his conviction for second degree murder stood in violation of due process because (a) he was not given adequate notice by indictment of the specific charges, and (b) that the state failed to prove the elements of any felony enumerated in the second degree, "felony-murder" statute, LSA-R.S. 14:30.1. A third claim was later raised to the effect that the trial judge, in charging the jury, gave the wrong definition of the crime of second degree murder.

Evidence in support of petitioner's ineffective assistance claim was introduced during a lengthy evidentiary hearing held by the State trial judge on November 17, 1982. At the conclusion of the hearing, all claims raised by the application were dismissed.

Supervisory writs were then taken to the Louisiana Supreme Court and were denied on March 4, 1983. Having

exhausted all state remedies, petitioner has now applied to this Court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254.

THE FACTS

Vernon was the owner of the Cave Bar in Leesville, Louisiana. On Halloween night, 1978, he, James Regallis and Timothy Bray were in the back room of the bar with Michael Melcher. Melcher was pressed to repay some debts. A gun was pointed at him, and there was a minor fracas in which Melcher received a small cut on the head.

Vernon, Regallis and Bray then ordered Melcher into Vernon's stationwagon and took him to the Vernon Parish sanitary landfill.

At the landfill, Vernon struck Melcher first, striking him in the stomach with a stick one and a half to two feet long and about an inch in diameter. Melcher's jacket was pulled down to immobilize his arms and the three men took turns kicking and beating him with the stick and a club almost six feet long and two inches in diameter. There was testimony that the men played baseball with Melcher: Vernon umpired, Regallis pretended to pitch and Bray swung the club, hitting

Melcher. They also engaged in Russian roulette, Regallis and Vernon each firing a shot about a foot above Melcher's head.

Melcher was left lying on his back, rolling his head from side to side and moaning. The other three returned to the Cave Bar.

A short time later, Bray, Regallis and Dale Slama went back to the landfill in Vernon's car. Melcher had pulled off his belt and thrown it aside and had completely unbuttoned his shirt. He felt cold and did not appear to be breathing. Slama removed Melcher's money and identification from his pockets and, with Bray's help, moved the victim deeper into the woods, Regallis set fire to the area of the beating to conceal blood, and the three men returned to the Cave Bar.

On November 2, 1978, Melcher's charred and beaten body was discovered by hunters at the ladfill site.

RELEVANT LOUISIANA STATUTES

Between October 1, 1976 and June 29, 1979, first degree "specific-intent" murder was defined as follows:

> "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm . . ." (R.S. 14:30, as amended by Act 1976, No. 657, effective October 1, 1976).

Second degree murder after September 8, 1978 and before June 29, 1979 had by definition included only felony murder:

> "Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated burglary, aggravated arson, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm . . . " (R.S. 14:30.1 as amended by Acts 1978, No. 796, § 1, effective September 8, 1978).

Second degree murder is a legislative responsive verdict to a first degree charge. See Article 814(a)(1), which reads in pertinent part as follows:

> Art. 814. Responsive verdicts; in particular
>
> A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:
>
> 1. First Degree Murder:
> Guilty.
> Guilty of Second degree murder.
> Guilty of manslaughter.
> Not guilty.

The principal on the alleged "due process" violation is whether Vernon was validly convicted of second degree murder which under the pertinent statutes at the time of the offense defined second degree murder

only as an unintential killing committed in the course of certain enumerated felonies. Vernon presents alternative arguments in support of his contention:

> (a) Petitioner's conviction of second degree murder violated the Sixth and Fourteenth Amendments, since the indictment, which charged Petitioner with first degree "specific intent murder," failed to give adequate notice of the crime for which he was convicted.
>
> (b) Petitioner's conviction of second degree "felony-murder" violates the rule of *Jackson v. Virginia*, since no rational trier of fact could have found the essential elements of any one of the felonies enumerated in Louisiana's second degree murder statute.

(a) Lack of Notice

Vernon raises a constitutional issue by asserting that he was convicted on a charge not stated in the indictment. The constitutional right is basic:

> "No principle of procedural due process is more clearly established thant (sic) that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused. . ."

In *Watson v. Jago, 558 F. 2d 330* (6th Cir. 1977), the court held that where a criminal defendant was forced to defend against felony-murder, although charged with deliberate and premeditated first degree murder, the resulting conviction was a denial of due

process under the Fourteenth Amendment. However, in that case Ohio law made it clear that premeditated and felony murder were two separate offenses. *Id. at 334-335.* Under Louisiana law (applicable on the date of the crime), second degree (felony murder) was a legislatively responsive verdict to a charge of first degree murder. See *La.C.Cr.P. Article 814.*

Petitioner relies heavily on the Louisiana Supreme Court case of *State v. Booker, 385 So.2d 1186 (1980),* citing this most helpful language from Judge Dennis' opinion on re-hearing:

> "It is a violation of due process either to send an accused to prison following conviction of a charge on which he was never tried or to convict him upon a charge that was never made.

If petitioner's contention as to "notice" is sustained it would be applicable to all second degree murder convictions returned in response to first degree murder indictments during this time span.

Booker involved an *attempted* first degree murder indictment to which the jury responded with an *attempted* second degree murder verdict. Judge Blanche and Watson categorically disagreed with that part of the opinion which held that defendant had no notice of the

crime.

> "(B)ecause as a matter of law it was a responsive verdict to the crime of which he had been charged." *Id. 1193.*

Judge Marcus also disagreed:

> "I would not reverse the conviction and sentence for attempted second degree murder because it was a responsive verdict to the crime charged." *Id. 1193.*

Justices Dixon and Lemmon concurred in reversal because:

> "Attempt requires that the offender act with specific intent. R.S. 14:27. In a logical analysis one cannot specifically intend (attempt) to do something that one does not intend to do. One therefore cannot attempt to kill a human being in the course of perpetrating another crime without intending to kill the victim. In other words there can be no such crime as attempted felony murder." *Id. 1193.*

Here we are not addressing an "attempted conviction" and the foregoing quotations *negate* an interpretation of *Booker* as authority for petitioner's lack of notice argument.

Booker was represented by a competent attorney who specializes in criminal defense work. This same attorney represented *Vernon* in his motion for a new trial. No effort was made to draw an analogy between the two. Subsequent Louisiana decisions citing *Booker* are

interesting. *State v. Sterling, 407 So.2d 1190,* had this to say:

> "Here as in Booker there was no proof of an underlying felony to support a conviction of second degree murder." *Id. 1191*

In *State ex. rel. Elaine,* (sic) *424 So.2d 246,* the Supreme Court of Louisiana certainly questioned the continuing vitality of Booker. There, they affirmed the "attempted second degree murder" conviction. In the course of that decision, we find this language:

> "The theory expressed in Justice Marcus' dissent in *Booker* and earlier in the *Peterson* case (that a jury may return a legislatively approved responsive verdict, whether or not *that verdict* is supported by the evidence, as long as the evidence is sufficient to sustain a conviction of the offense charged) recognizes the legitimacy of a 'compromise' verdict which does not 'fit' the evidence, but which for whatever reason) the jurors deemed to be fair. This view, which accords the jury the prerogative to return a verdict of a lesser offense which is not supported by the evidence, comports with the spirit of the responsive verdict article, since on major purpose of that article was to relieve the trial judge from having to review the evidence actually presented at the trial in order to decide which responsive verdicts should be given to the jury. *See La.C. Cr.P. Art. 814 Official Revision Comment (a)*
>
> "It would be unfair to permit the defendant to have the advantage of the possibility that a lesser 'compromise' verdict will be returned (as opposed to being convicted of the offense charged). and then to raise the complaint for the first time on appeal, that the evidence did

not support the responsive verdict to which he failed to object. Therefore, at least when the defendant fails to interpose a timely objection to a legislatively responsive verdict, this Court will not reverse the conviction if the jury returns such a verdict, whether or not that verdict is supported by the evidence, as long as the evidence is sufficient to support the offense charged."

"The jury's verdict was apparently a compromise decision to find defendant guilty of something less than attempted first degree murder. The jury chose the next highest offense from the list of responsive verdicts. While the evidence did not support a conviction of the offense chosen by the jury, the evidence would have supported a conviction of the charged offense. Because defendant did not object (because of an oversight or as a matter of trial strategy) to the instruction, which in effect informed the jury that it could properly return a verdict of attempted second degree murder, defendant cannot later complain that the evidence (which would have supported a conviction of the offense charged) did not support the lesser verdict chosen by the jury." *Id.* 252.

The evidence here would clearly have supported a conviction of first degree murder, and under the rational of *Elaire*, the conviction would stand. We cannot go "all the way" with *Elaire*, and would agree with the dissent that the second degree murder conviction should not have been permitted to stand, absent sufficient proof within the meaning of *Jackson v. Virginia*, 443 *U.S. 309*. We will reach that later.

We return now to the "notice" issue. A fair

evaluation of the record requires a rejection of the "lack of notice" contention. Felony (second degree) murder was a legislatively responsive verdict. Vernon and his counsel had full and timely notice of the charges against him. They knew that the felony murder theory would be submitted. They did not object to either the charge or the verdict forms that were given to the jury. No one was taken by surprise. Extensive and strong arguments were presented to the jury to avoid both a first degree verdict and a second degree conviction. Counsel may very well have been wise to let the case go to the jury with an option to return a verdict reducing the grade of the offense. Stated concretely, we hold that the indictment, together with Louisiana's responsive verdict statute, sufficiently apprised Vernon of what he must be prepared to meet. He knew it and endeavored to meet the issues both as to first degree and second degree murder.

(b) Sufficiency of the Evidence

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In Re Winship, 397 U.S. 358.* The applicant is entitled to relief if it is found that upon the

record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 324).* Applying this criteria, we hold that a rational trier of fact could reasonably have found beyond a reasonable doubt that the petitioner committed second degree murder under the Louisiana felony murder statute:

> "§ 30.1. Second degree murder.
>
> Second degree murder is the killing of a human being:
> When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm." L.R.S. 14:30.1.
>
> Aggravated kidnapping is defined as:
>
> "§ 44. Aggravated kidnapping
>
> Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:
>
> (1) The forcible seizing and carrying of any person from one place to another; or
>
> (2) The enticing or persuading of any person to go from one place to another; or
>
> (3) The imprisoning or forcible secreting of any person. L. R. S. 14:44.

A review of the record convinces us that a rational fact-finder could readily have found the petitioner guilty beyond a reasonable doubt of second degree murder. The jury could have found beyond a reasonable doubt that petitioner was engaged in the perpetration of "aggravated kidnapping." L.R.S. 14:44. Surely, Vernon and his two companions were guilty of the "forcible seizing and carrying of the victim" from the bar to the dump. To say the least, they were guilty of "enticing or persuading" him from "one place to another." See L.R.S.14:44(1) and (2). The evidence reveals that they possessed the intent to force the victim to give up something of value before they intended to abandon their possession of him. No useful purpose would be served by a recitation of the facts. We attach and make a part of this opinion pages 467-479, 490-494, and 877-888 of the record.

THE ERRONEOUS INSTRUCTION

The 1978 second degree murder statute became effective on September 8, 1978, almost two months before Melcher's death on October 31, 1978. Instead of reading this statute to the jury, the trial judge provided the jury with the definition of second degree murder

that was effective prior to September 8, 1978. No objection was taken during the submission. The issue was not included in assignment of errors on defendant's appeal to the Louisiana Supreme Court. It was not urged in his motion for a new trial -- which was denied by the Supreme Court. It was not included in the original petition for habeas corpus but was later added by counsel to that petition.

Act 657 of 1976 amended the second degree murder statute, redefining the crime to include only felony murder (amending L.R.S.14:30.1). Act 121 of 1977 added a second definition: "The killing of a human being when the offender has a specific intent to kill," provided that there are no aggravating circumstances. The felony murder definition which was read to the jury remained the same. Act 796 eliminated this superfluous definition of second degree murder. It is obvious that the 1977 second added definition was not applicable to the facts of this case. Our case does not involve the absense of aggravating circumstances. *Art. 905.4, Louisiana Code of Criminal Procedure.* Here, the jury was properly instructed as to the definition of first degree murder and the instruction on second degree was

correct and in error only insofar as deleted subparagraph B was added -- which was in effect superfluous.

The Chief Justice of the United States Supreme Court, in his concurring opinion in *Kibbe, 431 U.S. 145, 157,* made this pertinent observation:

> "In my view, the federal court was precluded from granting respondent's petition for collateral relief under 28 U.S.C. 2254 because he failed to object to the jury instruction at the time they were given. By that failure he waived any claim of constitutional error.

Orderly procedure requires that the respective views as to instructions should be presented to the trial judge so as to minimize the risk of committing reversible error. It is a rare case in which an improper instruction will justify reversal of a criminal conviction when the first complaint appears five years after conviction. The burden of demonstrating that a superfluous instruction was so prejudicial that it will support a collateral attack on the constitutionality of a state criminal conviction is even greater that the showing required to establish plain error on direct appeal. *Buatamonte, 412 U.S. 218, 256-266* (J. Powell concurring).

The question is whether the instruction by itself

so infected the entire trial that the resulting conviction violated due process. Here, even if we were to make the unlikely assumption that the jury might have reached a different conclusion, if the superfluous instruction had been deleted, the possibility is too speculative to justify the conclusion that constitutional error was committed. The procedural history of this case and the evidence presented at trial indicate that there exists here neither "cause" nor "prejudice" as are necessary to support federal habeas corpus review of the underlying constitutional contention as to the instruction. *Wainwright v. Sykes, 433 U.S. 72.*

COUNSEL

The Supreme Court of the United States on May 14, 1984, has synthesized the well-established standards of habeas review for alleged ineffective assistance of counsel. *Strickland v. Washington, 52 L.W. 4565).* We appreciate that in a federal habeas challenge to a state criminal conviction, a state court conclusion is not a finding of fact binding on us to the extent stated by 28 U.S.C. 2254(d). *(52 L.W. 4565).* We are required to make an independent review of the district court's ultimate conclusion that counsel had been

effective because this conclusion requires a decision as to whether or not there has been a constitutional violation.

The benchmark for judging any claim of ineffective counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland, supra.* Dr. George McCormick was called by the State to testify as an expert in the field of forensic pathology. His testimony on direct examination established brain injury secondary to at least two skull fractures as the cause of death and negated the inference that death was caused by the (post-attack) burning of the body. Vernon now argues that his retained counsel was aware of what this testimony would be despite this knowledge, trial counsel's only preparation on this issue consisted of the telephonic conversations with the local coroner (Dr. Jones), a general practitioner. It is argued that counsel should have consulted an expert in the field. It is further argued that counsel went to trial without a transcript of Dr. McCormick's prior testimony in the Regallis trial. These omissions, Vernon insists,

were unreasonable and fall below the standard to be expected of counsel.

The record reveals that Dr. McCormick was extensively cross-examined by counsel, who had been actively engaged in the practice since 1971. He seems to have possessed an extremely good knowledge of the facts and issues. The District Attorney had practically opened his file to counsel. Trial counsel reasoned that Dr. Smith, (sic) a local doctor and parish official (coroner) would have been the best witness "in front of a local jury" and that his opinion on the issue of when actual death occured would prevail. Dr. Freeman's testimony at the habeas hearing is to the effect that it is just not scientifically possible to determine whether Mr. Melcher was dead before he was burned. Dr. McCormick testified that he was cross-examined in a rather probing fashion by counsel (Gold). Counsel's strategy choice of relying on the coroner's testimony was well within the range of professionally reasonable judgments. The aggravating circumstances were utterly overwhelming.

Petitioner has failed to make the required showing of either deficient performance or sufficient prejudice

to support the ineffectiveness claim.

CONCLUSION

The petition for a writ of habeas corpus is denied.

A certificate of probable cause will be granted.

SIGNED at Lake Charles, Louisiana on May 23rd, 1984.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

JOEL A. VERNON, SR.,

VS CIVIL ACTION NO. 83-2221

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY

O R D E R

The petition for a writ of habeas corpus is denied and the case is dismissed.

A Certificate of Probable Cause is granted and attached.

SIGNED at Lake Charles, Louisiana on May 23, 1984.

Edwin F. Hunter Jr.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

JOEL A. VERNON, SR.

VS. CIVIL ACTION NO. 83-2221

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY

CERTIFICATE OF PROBABLE CAUSE

The undersigned certifies that there is probable cause for appeal from this order of May 23rd, 1984, denying the writ of habeas corpus.

THUS DONE AND SIGNED at Lake Charles, Louisiana, on this the 23rd day of May, 1984.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

JOEL A. VERNON, SR.

VS CIVIL ACTION NO. 83-2221

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY

On March 20, 1984 we signed the written memorandum of the Magistrate granting the writ of habeas corpus. We promptly advised the State that if it did not agree with the conclusions it should request a rehearing before me. The request was made and oral arguments were heard on April 23, 1984. A decision denying the writ and recalling our order of March 20, 1984 was issued on May 23, 1984.

Petitioner now seeks a rehearing and an amendment of judgment. It is argued that the court has liberally construed the aggravated kidnapping statute contrary to interpretations given the same statute by the Supreme Court of Louisiana in *State v. Moore, 432 So.2d 209 (La. 1983)*, and by Louisiana's Appellate Court in *State v. Rodrigue, 441 So.2d 1274*.

In *State ex rel Elaire, 424 So.2d 246*, the Supreme

Court of Louisiana seems to have held that a jury may return a legislatively approved responsive verdict, whether or not that verdict is supported by the evidence, as long as the evidence is sufficient to sustain a conviction of the charged offense. (See pages 7, 8, and 9 of our opinion of May 23, 1984). If we had accepted that argument, our inquiry would have ended because the evidence was sufficient to support a first degree murder verdict.

But, we declined to accept this premise and proceeded to examine the transcript to address felony murder. In *Moore*, the Supreme Court of Louisiana affirmed a first degree murder verdict, returned pursuant to L.S.A.-R.S.14:30. The Court rejected the aggravated kidnapping theory but noted that the evidence clearly supported a finding that the murder was committed during the perpetration of an armed robbery. *(432 So. 2d 209, 225)*. The victim had left home with $230 cash, the combination to his store safe, a .30 calibre pistol, and a pocket knife. These items were missing from the victim's body.[1] Here, Melcher's money and identif-

---

1. Armed Robbery (as Aggravated Kidnapping) is, of course, part and parcel of the felony murder

ication were later taken from his pockets by Slama. The victim was seized, robbed and killed; possible release was not considered. In *Rodrigue*, the victim was forced into a truck, slapped, tied with wire, and forced to commit oral sex. The dominant rationale of *Rodrigue* was that the victim was not going to be released until the act had been committed under any circumstances.

In this case (Vernon) we have fully reviewed the transcript, citing and making a part of our May 23rd opinion some 25 pages of that transcript. Melcher was pressed to repay a relatively small debt. When he did not pay, a gun was pointed at him. He was forcibly ordered into Vernon's stationwagon and taken to the Vernon Parish sanitary landfill, where he was beaten and killed. We believe the record supports a finding that he would have been released at the outset if he had paid or promised to pay the money. Of course, when the atrocious beating began, it was a different story.

We reiterate our conclusion that any rational trier of fact could have found the essential elements of the

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state. L.R.S. 30.1. The verdict in *Moore* did not involve the responsive *(con't on next page)*

crime beyond a reasonable doubt.

Petitioner's motions are denied.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this the 5th day of June, 1984.

Edwin F. Hunter, Jr.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

(con't from preceding page) verdict issue. There, the court dealt with first degree murder and the statutory aggravated circumstances under La. C. Cr. P. art 905.4.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

JOEL A. VERNON, SR.

VS. CIVIL ACTION NO. 83-2221

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY

FOR THE PETITIONER	Messrs. Louis B. Cosenza P. O. Box 1147 Lessville, LA 71446
FOR THE DEFENDANT	William E. Tilley District Attorney 30th Judicial District Court Vernon Parish Leesville, LA 71446

HUNTER, JUDGE

MEMORANDUM RULING ON PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Joel A. Vernon, Sr. was convicted of second degree murder by a jury in the Thirtieth Judicial District Court, Vernon Parish, Louisiana. He was sentenced to life imprisonment. Vernon is presently incarcerated in the Louisiana State Penitentiary where he is serving his sentence.

He appealed the said conviction and sentence, which, on May 19, 1980 were affirmed by the Louisiana Supreme Court. *State v. Vernon, 385 So.2d 200.*

In Vernon's appeal to the Supreme Court of Louisiana, it was established that he was charged by Grand Jury indictment with *first degree murder* in violation of L.S.A.-R.S. 14:30. Following trial by jury, he was convicted of an alleged lesser included offense of second degree murder. In support of reversal he set forth twenty-six assignments of error. None of the four grounds in support of his September 19, 1983 habeas corpus petition filed in this Court were included among the assigments of error. The four grounds alleged in the instant petition in which he asserts a denial of constitutional rights are:

GROUND ONE:

> Petitioner's conviction of second degree murder violated the Sixth and Fourteenth Amendments since the indictment, which charged petitioner with first degree "specific intent" murder, failed to give adequate notice of the crime for which he was convicted.

GROUND TWO:

> Petitioner's conviction of second degree felony murder violates the rule of Jackson v. Virginia since no rational trier of fact when considering the evidence in the light most favorable

to the prosecution could have found the elements of any one of the felonies enumerated in Louisiana's second degree murder statute.

GROUND THREE:

The trial court's erroneous instruction to the jury, which contained the wrong definition of second degree murder, so infected the trial that petitioner's conviction violates due process.

GROUND FOUR:

Petitioner was denied effective assistance of counsel.

All contentions have been denied by the respondent, Ross Maggio, Warden, Louisiana State Penitentiary.

Subsequent to the Louisiana Supreme Court's May 19, 1980 decision, petitioner filed a Motion for a New Trial on the ground of newly discovered evidence. The motion was denied by the trial court on December 16, 1980. Application for writs of certiorari was then filed with the Louisiana Supreme Court. On March 27, 1981, the application was denied. On August 17, 1982, Mr. Vernon filed in the State District Court a pro se application for post conviction relief,* in which application the issues presently before this Court were

*Vol. II, Exhibits, Pgs. 101-108.

raised, vis:

1. He was denied effective assistance of counsel;

2. His conviction for second degree murder was in violation of due process in that:
   a. He was not given adequate notice by the indictment of the specific charges against which he would be called on to defend; and,
   b. The State failed to present the elements of any felony enumerated in the second degree felony murder statute, L.S.A. - R.S. 14:30.1.

Other issues raised by Vernon at the State hearing for post conviction relief were that:

1. The trial judge, in charging the jury, gave the wrong definition of the crime of second degree murder;
2. At trial he was denied effective assistance of counsel.

All claims raised were thereafter dismissed by the trial judge. Whereupon, an application for supervisory writs was filed with the Louisiana Supreme Court. On March 4, 1983 the application was denied. *No. 83-KP-0143, State of Louisiana ex rel Joel A. Vernon, Sr. v. Ross Maggio, Warden.* The petitioner now applies to this Court for habeas corpus relief pursuant to 28 U.S.C. Section 2254.

BACKGROUND

Vernon was the owner of the Cave Bar in Leesville,

Louisiana. On Halloween night, 1978, he, James Regallis and Timothy Bray were in the back room of the bar with Michael Melcher. Melcher was pressed to repay some debts. A gun was pointed at him, and there was a minor fracas in which Melcher received a small cut on the head.

Vernon, Regallis and Bray then ordered Melcher into Vernon's stationwagon and took him to the Vernon Parish sanitary landfill.

At the landfill, Vernon hit Melcher first, striking him in the stomach with a stick one and a half to two feet long and about an inch in diameter. Melcher's jacket was pulled down to immobilize his arms and the three men took turns kicking and beating him with the stick and a club almost six feet long and two inches in diameter. There was testimony that the men played baseball with Melcher: Vernon umpired, Regallis pretended to pitch and Bray swung the club, hitting Melcher. They also engaged in Russian roulette, Regallis and Vernon each firing a shot about a foot above Melcher's head.

Melcher was left lying on his back, rolling his head from side to side and moaning. The other three returned to the Cave Bar.

A short time later, Bray, Regallis and Dale Slama went back to the landfill in Vernon's car. Melcher had pulled off his belt and thrown it aside and had completely unbuttoned his shirt. He felt cold and didn't appear to be breathing. Slama removed Melcher's money and identification from his pockets and, with Bray's help, moved the victim deeper into the woods. Regallis set fire to the area of the beating to conceal blood, and the three men returned to the Cave Bar.

On November 2, 1978, Melcher's charred and beaten body was discovered by hunters at the landfill site.

LEGAL ANALYSIS

The petitioner asserted basically four grounds for federal habeas corpus relief. After a careful review of the record and a diligent analysis of petitioner's contentions in support of each ground, a resolution by this Court on all grounds is being deferred, except Ground One, viz: That petitioner's conviction of second degree "felony - murder" violated the Sixth and Fourteenth Amendments since the indictment, which charged petitioner with first degree "specific - intent" murder, failed to give adequate notice of the crime for which he was convicted.

Petitioner was charged by indictment in the October 31, 1978 slaying of Michael Melcher. The indictment alleged that he then "committed first degree murder of Michael E. Melcher, in violation of R.S. 14:30." On October 31, 1978, first degree murder was defined as follows:

> "First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm . . ." (R.S. 14:30, as amended by Acts 1976, No. 657, effective October 1, 1976).

After trial, petitioner was convicted of second degree murder which, at the time of the offense (October 31, 1978) was defined as follows:

> "Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated escape aggravated burglary, aggravated kidnapping, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm . . ." (R.S. 14:30.1 as amended by Acts 796, Section 1, effective September 8,1978.

First degree murder on October 31, 1978, the date of the crime, was defined simply as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. Whereas, on said date, second degree murder was limited to the killing of a human being when the offender is engaged in the

perpetration or attempted perpetration of seven specified felonies. Accordingly, second degree murder, as of its effective date (September 8, 1978), *was not a lesser included offense* of first degree murder since conviction thereof required proof of an element, i.e., the commission of an underlying felony, whereas a conviction for first degree murder did not require such proof. Thus, such a conviction was in violation of due process since the petitioner was convicted of a charge for which he was not given adequate notice and against which he had no chance to defend. In the case of *State of Louisiana v. Sam Booker, Jr., 385 So.2d 1186 (Jan. 28, 1980, reh. den. July 7, 1980),* the Louisiana Supreme Court reversed the conviction of Booker for attempted second degree murder where the indictment charged him with attempted first degree murder and held that dispite the inclusion of attempted second degree murder and the responsive verdict statute, C.Cr.P.Art. 814, the offense of attempted second degree murder, as defined in 1978, was not a lesser included offense of attempted first degree murder. Although the Court's holding in the *Booker* case has been reaffirmed on numerous occasions, the trial court failed to apply this

well-established case law to petitioner's conviction.

The right to reasonable notice of a charge against an accused is the most basic ingredient of due process, a right that is guaranteed by the Sixth Amendment, a right which is applicable to State proceedings by virtue of its incorporation into the Fourteenth Amendment. *Jackson v. Virginia, 99 S.Ct. 2781 (1979).* There cannot be any variance between the complaint and proof which "destroys the defendant's substantial right to be tried only on charges presented in any indictment." Any variance therefrom is not harmless error. *Stirone v. U.S. 361 U.S. 212, 217; See also Tarpley v. Estelle, 703 F.2d 157 (5 Cir. 1983).* According to the cited authorities, where a responsive verdict is not a lesser included offense of a crime charged in the indictment, a conviction of that responsive verdict is unconstitutional.

The applicable law to the instant case clearly establishes that the 1978 first and second degree murder statutes are separate and distinct offenses. The federal courts have not hesitated to grant habeas corpus relief to a state criminal defendant convicted of an offense without the charge being set forth in the

indictment.

Where a verdict is not a lesser included offense of the crime charged in the indictment, even though it may have been responsive, a conviction thereof is unconstitutional. Here, Mr. Vernon's conviction stemmed from the erroneous instruction from which the jury concluded that he was subject to conviction for a crime with which he was never charged.

Further argument in support of his application for federal habeas corpus relief is that the trial court gave the jury the wrong definition of the crime of second degree murder. As previously mentioned, petitioner should have been charged under the second degree murder statute which went into effect on *September 8, 1978*. Such a conviction is likewise in violation of due process since Vernon was convicted upon a charge for which he was not given notice and against which he was given no oppotunity to defend.

Another issue advanced in support of his petition for federal habeas corpus relief was that the conviction of second degree murder, an offense which required the introduction of proof that he had committed one of seven felonies enumerated in LSA-R.S. 14:30.1, was

totally devoid of evidentiary support. The Court, in *Jackson v. Virginia, supra,* held that the appropriate Standard of review must be "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See also *Thompson v. Louisville, 362 U.S. 199,* in which case the Court held that a conviction totally devoid of evidentiary support constitutes an "arbitrary deprivation of liberty." Although the standard requires a careful review of the entire trial transcript in order to resolve the "most favorable" issue, reference to the facts in this case as stated by the Louisiana Supreme Court on appeal *(State v. Vernon, 385 So.2d 200, at 203)* will suffice for the purpose of this discussion. Quite simply, the violence directed at the victim was retaliation for *non-payment of a debt.* No proof that at least one of seven felonies enumerated in R. S. 14:30.1 was introduced. For such reasons, the trial jury may not consider a responsive verdict which is not supported by the evidence. To do so would inject "an element of capriciousness" into jury deliberations and plainly invites the jurors to

disregard their oaths." *Roberts v. La. 96 S.Ct. 3001, (1976).*

In *U.S. v. Pope, 561 F.2d 663 (6th Cir. 1977)* in accordance with *U. S. v. Borch, 505 F.2d 78 (5 Cir. 1974)*, the Sixth Circuit held that failure to instruct on an essential element of an offense is "fundamental error" which cannot be cured by reference to the indictment or by reading the unexplained language of the statute to the jury. Federal habeas corpus relief has been granted in numerous cases when the jury has been misinformed, as in the instant case. See also *Mullany v. Wilbur, 421 U.S. 684 (1975); Victory v. Bombard (1977 D.C.N.Y.) 432 F.Supp. 1240,* and the Louisiana case of *Clark v. La. State Penitentiary, (1981 M.D.La.) 520 F.Supp. 1046.*

CONCLUSION

Since the Court has concluded that the petitioner, Mr. Vernon, was denied a safeguard guaranteed by due process of law, his conviction and sentence for second degree murder are reversed and the case is remanded to the State District Court for proceedings not inconsistent with this opinion. Because this reversal does not constitute a decision that the State failed to prove

its case, the double jeopardy clause does not bar further prosecution of Mr. Vernon in connection with the alleged criminal activity. *Burks v. U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).* The jury's second degree murder conviction herein, however, operates as an acquittal and bar of a second prosecution of the petitioner on the charge of first degree murder. *Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 1 L.Ed.2d 221 (1957).*

Accordingly, this matter is remanded to the State Court for the purpose of conducting, within 120 days, a new trial of petitioner for any crime except the October 31, 1978 first degree murder of Michael E. Melcher, and that the second trial thereof be before a new jury, in accordance with Louisiana law.

THUS DONE AND SIGNED, in Chambers, at Lake Charles Louisiana, on this the 20th day of March, 1984.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

JOEL A. VERNON, SR.

VS. CIVIL ACTION NO. 83-2221

ROSS MAGGIO, WARDEN
LOUISIANA STATE PENITENTIARY

O R D E R

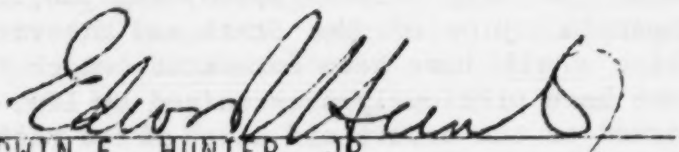
Upon consideration of the petition of Joel A. Vernon, Sr. for a Writ of Habeas Corpus, and for the reasons set forth in the foregoing memorandum Opinion,

IT IS ORDERED that the conviction and sentence imposed upon Joel A. Vernon, Sr., by the Thirtieth Judicial District Court, Parish of Vernon, State of Louisiana, is VACATED, and the petitioner is GRANTED partial *habeas corpus* relief.

IT IS FURTHER ORDERED that this matter is REMANDED to the Thirtieth Judicial District Court, Parish of Vernon, State of Louisiana, for the purpose of conducting within 120 days a new trial for any crime except the October 31, 1978 first degree murder of Michael E. Melcher, and that the second trial thereof be before a

new jury, in accordance with Louisiana law.

DATED AND SIGNED at Lake Charles, Louisiana, this 20th day of March, 1984.



EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX

UNITED STATES CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA CODE OF CRIMINAL PROCEDURE ANNOTATED ARTICLE 814 (West 1981):

A. The only responsive verdicts which may be rendered when the indictment charges the following offenses are"

1. First Degree Murder:
   Guilty.
   Guilty of second degree murder.
   Guilty of manslaughter.
   Not guilty.

LOUISIANA REVISED STATUTE ANNOTATED SECTION 14:30, as amended by Acts 1976, No. 657:

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

LOUISIANA REVISED STATUTE ANNOTATED SECTION 14:30.1, amended by Acts 1978, No. 769:

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, and armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

LOUISIANA REVISED STATUTE ANNOTATED SECTION 14:44:

Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

(1) The forcible seizing and carrying of any person from one place to another; or

(2) The enticing or persuading of any person to go from one place to another; or

(3) The imprisoning or forcible secreting of any person.